

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARNELL MCGARY,

Plaintiff,

v.

HENRY RICHARDS,

Defendant.

Case No. CV05-5317RBL

ORDER DENYING
CERTIFICATE OF
APPEALABILITY

This matter comes before the court on the petitioner's Notice of Appeal. [See Dkt. #s 14 and 16] The court must consider whether to grant or deny the petitioner a Certificate of Appealability. *See* 28 U.S.C. 2253(c)(3). The court has reviewed the record in this matter.

The court adopted the magistrate judge's report and recommendation, and dismissed the Plaintiff's complaint without prejudice. It found that the Plaintiff's motion for a temporary restraining order was premature, and that his petition for a writ of habeas corpus was flawed because he had not alleged that the highest state court had reviewed his claims (and it was apparent from the record that it had not).

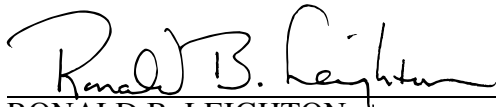
The district court should grant an application for a Certificate of Appealability only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

1 When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason
2 would find it debatable whether the petition states a valid claim of the denial of a constitutional right and
3 that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
4 *Slack v. McDaniel*, 120 S.Ct. at 1604.

5 It is clear from the record in this case that this is a standard Mr. McGary cannot meet. His petition
6 for a TRO was premature, and he did not address his failure to exhaust his claim in state court.
7 Accordingly, it is hereby

8 **ORDERED** that petitioner's motion for a Certificate of Appealability is **DENIED**.
9 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party
10 appearing *pro se* at his or her last known address.

11 DATED this 10th day of November, 2005

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14 RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE
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